Europe and the Sovereignty of the People[1]

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In Britain, commentators on the constitution have an easy life, since we have no constitution. That is because our only constitutional principle is—or perhaps was, until we entered the European Community in 1973—the sovereignty of Parliament. That principle of course conflicts with the principle of the supremacy of European law.

Europe, however, has also been responsible for the introduction of a new principle into the British constitution—the principle of the sovereignty of the people, a principle which, in some respects, supersedes the sovereignty of Parliament. The principle of the sovereignty of the people was introduced into national politics in 1975 to resolve the European issue.

In 1975, as in 2016, it seemed that the party system could not resolve the European issue. In 1970, the last general election before we entered the European Community, all three parties were in favour of entry. How, then, could a voter opposed to entry indicate that through her vote? In the 2015 election, the three major parties favoured Britain remaining in the EU. The only way a voter could indicate a preference for Leave was by voting for UKIP, a party severely handicapped by the electoral system.

But there was a further reason for the referendum. It was that membership of the European Community could be given legitimacy only through a vote by the people. In 1975, the Leader of the House, Edward Short, said, 'The issue [of Europe] continues to divide the country. The decision to go in has not been accepted. That is the essence of the case for having a referendum.' Similarly, in his Bloomberg speech in January 2013 proposing a further referendum, David Cameron declared that consent to the European Union in Britain was but 'wafer thin', and needed further endorsement by the people.

It is a weakness in the doctrine of parliamentary sovereignty, and one that Dicey was fully aware of, that there are some decisions so fundamental that a decision by Parliament alone does not yield legitimacy. In particular, MPs, while given the authority by the people to legislate, do not have authority to transfer the powers of Parliament either upwards—to the European Union, a principle confirmed by the European Union Act of 2011—or downwards, via devolution. It is now a convention of the constitution that legislative devolution must be preceded by a referendum.

This limitation on the sovereignty of parliament reflects a liberal doctrine first laid out in John Locke's Second Treatise. 'The Legislative', Locke insists, 'cannot transfer the power of making laws to any other hands. For it being but a delegated power from the people, they who have it cannot pass it to others.' Voters entrust MPs as agents with legislative powers, but they do not give them authority to transfer those powers, to make radical alterations in the machinery by which laws are to be made. Such authority can be obtained only through a specific mandate, that is, a referendum.

The referendum gives us a form of constitutional protection—perhaps the only form of constitutional protection for a country without a written constitution—in which Parliament is sovereign and can do what it likes. The referendum is a safeguard against major constitutional changes which the people do not want. It is the people's veto. It prevented devolution in 1979, and may have prevented membership of the euro at the beginning of the twenty-first century, since the Blair government, which enjoyed a large majority in Parliament, favoured it. The referendum has now ejected Britain from the European Union.

The 1975 referendum, by contrast, had validated our entry into Europe by a margin of two to one. But that outcome did not reflect enthusiasm for Europe. It stemmed rather

Published by John Wiley & Sons Ltd, 9600 Garsington Road, Oxford OX4 2DQ, UK and 350 Main Street, Malden, MA 02148, USA

from two other factors. The first was fear of the economic consequences if Britain remained outside. Britain was then the sick man of Europe. Inflation reached 27 per cent in June 1975, the highest figure ever recorded. Unemployment was rising, and there was great apprehension at growing trade union power. The Continent by contrast seemed to be thriving and to have found the secret of economic progress. It seemed that Britain could not afford to remain outside the European Community. As Britain's Commissioner, Sir Christopher Soames, declared, 'This is no time for Britain to be considering leaving a Christmas club, let alone the Common Market.'

The second factor was deference towards political leaders of the centre, all of whom favoured Europe—Harold Wilson, James Callaghan, Roy Jenkins, Shirley Williams, Edward Heath, William Whitelaw. Against Europe, by contrast, were Enoch Powell, Tony Benn, Michael Foot, Ian Paisley, the National Front, the Communist party and most of the trade union leaders. It was easy for the pro-Europeans to label all opponents of EU as extremists.

There was, then, fear, not only of what would happen if Britain left, but also of those advocating a 'No' vote—fear of extremism. Harold Wilson told one of his advisers that his main reason for voting 'Yes' was that a victory for 'No' would empower 'the wrong kind of people in Britain: the Benn left and the Powell right, who were often extreme nationalists, protectionist, xenophobic and backward-looking'. At the final rally of the Britain in Europe campaign, Roy Jenkins declared that for Britain to leave the European Community would be to go into 'an old people's home for fading nations—I do not think it would be a very comfortable old people's home. I do not like the look of some of the prospective wardens.'

But there was a puzzle. There was a dog that did not bark in 1975. Those opposed to Europe—Enoch Powell and his largely working-class Tory following and the Labour Left—sought to arouse an anti-establishment grass-roots movement against Europe such as had arisen in Norway, and had led to Norway rejecting entry to the European Community in 1972 against the advice of the political leadership. Enoch Powell tried to do the same. 'Let's look', he suggested, 'at the record of these people [the pro-Europeans] who "know best"; who can tell you what will be good for Britain, not just this year or next year but for generations to come. We discover that these are the very people who have always been wrong. Not one horse they have tipped has ever won.' Why did this appeal fail?

It failed largely for the reason given by Roy Jenkins when he patronisingly concluded that the voters 'took the advice of people they were used to following'.

The 1975 referendum seemed to settle the issue of Europe for good. But Enoch Powell rightly declared that it was a provisional result, since our membership depended on the continuing assent of Parliament. He might have added: and of the people.

The dog that failed to bark in 1975 barked very loudly in 2016. The fear element now worked towards leaving Europe, not remaining. There was a greater fear of uncontrolled immigration than of the economic consequences of Brexit, and deference towards the political leaders, and the experts—towards those who know best—has almost entirely disappeared.

Both factors are largely a consequence of the credit crunch of 2008. Since 2008, those on low wages have seen their standard of living increase hardly at all, while the riches of the better-off seem to have remained untouched. The political and financial elites have seemed less than competent in dealing with the fallout from the crisis, while the economists, as the Queen pointed out, seem not to have seen it coming. It is hardly surprising that the hair-raising predictions of the 'experts' as to the consequences of Brexit were largely ignored.

Ed Miliband hoped that 2008 would prove a social-democratic moment. In fact, it has proved, in Britain as on the Continent, to herald a nationalist moment. On the Continent, the main effect has been to weaken parties of the centre in favour of parties of the extreme right, and in the Mediterranean countries, parties of the extreme left. The main victims have been social-democratic parties. We can expect, therefore, in Britain as on the Continent, a more polarised political debate of the kind that we had until

the defenestration of Margaret Thatcher in 1990.

Postwar Labour leaders such as Clement Attlee and Hugh Gaitskell were opposed to Europe because they believed that it would prevent the achievement of social democracy in one country. Margaret Thatcher came to be opposed to Europe because she believed that it would prevent policies of market economics in one country. Those two doctrines—social democracy and the free market—have now been released from the grip of Europe; and, given the weakness of the Labour Party, the political beneficiary is likely to be the free-market Right. So the referendum is likely to presage a movement to the right—not to the traditional conservative Right, but to a populist and nationalist Right of the kind such as used to be represented by Enoch Powell and Margaret Thatcher. The referendum of 2016 marked their triumph from beyond the grave.

The outcome in 2016 was of course unexpected. It will be seismic in its effects. Perhaps the only comparable event in the twentieth century is the general election of 1945, an outcome also quite unexpected. Indeed, in 1945, one elderly disappointed voter declared that 'the people have elected a Labour government and the country will not stand for it'. Like 1945, the referendum was a victory for working-class power. In recent general elections, the working-class vote has counted for little, since many live in safe Labour seats. But in the referendum, every vote counts—one reason, no doubt, for the high turnout.

The 2016 referendum was an emphatic repudiation of the government. Turnout, at 72 per cent, was the highest since the 1992 election, and highest in the Leave areas. Indeed, it is said that some voters were going to the polls for the first time since electing Margaret Thatcher in 1987.

The lowest turnouts were amongst Remain voters. Of the four regions with the lowest turnouts, three were Remain areas: Northern Ireland, Scotland—which had the second lowest turnout in the UK—and London. Yet, it was voters in these areas who were foremost in demanding a second referendum.

The government having been repudiated, David Cameron resigned. The referendum had become a recall. The referendum was a genuine grass-roots insurgency, a revolt from below. Such revolts are very rare in British politics. Indeed, perhaps the only similar revolt from below took place as long ago as 1922, when grass-roots insurgents in the Conservative Party and rebel back-benchers pulled the party out of the Lloyd George coalition. That rebellion destroyed the political career of Lloyd George and made the political career of Stanley Baldwin, whose prospects otherwise would not have been bright. No doubt the referendum of 2016 will also destroy and make political careers.

Much has been written concerning the consequences of the referendum for the constitution. But perhaps the main consequences are for the party system. The 1975 referendum led in the 1980s to political realignment on the left-centre. The 2016 referendum could lead to a political realignment on the right-centre, both within the Conservative party and between the Conservatives and UKIP.

The referendum has now established itself as a third chamber of Parliament, issuing legislative instructions to the other two. The sovereignty of the people is trumping the sovereignty of Parliament. The Commons is required, perhaps for the first time in its history, to follow a policy to which around three quarters of MPs are opposed. The sovereignty of Parliament is now to be constrained—not legally, of course, but for all practical purposes—not by Brussels but by the people.

The referendum has exposed how unrepresentative the Parliament elected in 2015 is. That of course is the case for an election dissolving Parliament so as to produce a more representative one. Those who lost the referendum would, however, seem to prefer, adapting Bertolt Brecht, dissolving the people so as to produce a new electorate prepared to sustain the view of Parliament.

The high turnout in the referendum is a striking illustration of democratic commitment on the part of the least fortunate in our society. The greatest threat to democracy, after all, is an inert electorate, one that has ceased to think about public issues. John Stuart Mill once wrote that we learn to swim or cycle not by reading books about swimming or cycling, but by doing them. Similarly, we

learn about democracy not by reading books about it, but by doing it, that is, by participating in making decisions.

Modern liberals, however, are not comfortable with the doctrine of the sovereignty of the people. They echo the attitude of Jean Rey, ex-President of the European Commission, who, in 1974, deplored the coming referendum: 'A referendum on this matter consists of consulting people who don't know the problems instead of consulting people who know them. I would deplore a situation in which the policy of this great country should be left to housewives, It should be decided instead by trained and informed people.'

Modern liberals find themselves in curious alliance with nineteenth-century conservatives who opposed the extension of the franchise, arguing that the people were ill-educated, too prone to be moved by demagogues, and unable to understand complex political issues. The people should instead continue to be ruled by their betters.

Perhaps modern liberals might come ruefully to sympathise with the view of the great French reactionary and opponent of the French Revolution, Joseph de Maistre, that 'The principle of the sovereignty of the people is so dangerous that, even if it were true, it would be necessary to conceal it.'

Notes

1 The lecture was delivered on 30 June at Europe House, London, under the auspices of Nuffield College, Oxford, and filmed by the BBC Parliament Channel.

